

Nos. 07-1036, 07-1080, 07-1085

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FINCH, PRUYN & COMPANY, INCORPORATED
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER and FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and
SERVICE WORKERS INTERNATIONAL UNION**
Intervenor

**UNITED STEEL, PAPER and FORESTRY, RUBBER,
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SERVICE WORKERS INTERNATIONAL UNION**
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

FINCH, PRUYN & COMPANY, INCORPORATED
Intervenor

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Local Rule 28(a)(1), the National Labor Relations Board (“the Board”) respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Locals 18 and 155 (collectively “the Union”), were the Charging Parties before the Board. The Union is the Petitioner in Case No. 07-1085, and the Intervenor in Case No. 07-1080.

2. Finch, Pruyn & Company, Inc. (“Finch”) was the Respondent before the Board and is, before this Court, the Petitioner in Case No. 07-1037, the Cross-Respondent in Case No. 07-1080, and the Intervenor in Case No. 07-1085.

3. Before the Court, the Board is the Respondent/Cross-Petitioner in Cases Nos. 07-1036 and 07-1080, and the Respondent in Case No. 07-1085.

B. Ruling Under Review

Both Finch and the Union are seeking review of the Board’s Decision and Order in Cases Nos. 3-CA-23461-1 and 3-CA-23641-2 (*Finch, Pruyn & Company, Inc.*). The Board issued its Decision and Order on January 31, 2007, and reported it at 349 NLRB No. 28.

C. Related Cases

This case has not previously been before this or any other court. Although the Union originally filed its petition for review of the Board's underlying decision and order in the United States Court of Appeals for the Second Circuit, on February 27, 2007, the Judicial Panel on Multidistrict Litigation transferred that case to this Court, which docketed the Union's petition as Case No. 07-0185.

Board counsel are not aware of any potentially related cases either pending or about to be presented before this Court or any other court.

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GLOSSARY

A.....	Joint Appendix filed by the parties in this case
Act.....	National Labor Relations Act (29 U.S.C. §§ 151 <i>et seq.</i>)
Board.....	National Labor Relations Board
Br.....	Finch's and the Union's Opening Briefs to this Court
Finch.....	Finch, Pruyn & Company, Incorporated
IP.....	International Paper Company
Local 18.....	Local 18, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Local 155.....	Local 155, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
PCC.....	precipitated calcium carbonate ()
Union.....	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 18 and Local 155

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board (“the Board”) had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's order is final with respect to all parties under Section 10(e) of the Act. This Court has jurisdiction under Section 10(e) and (f) of the Act, which authorizes parties to seek review of Board orders in this Circuit.

The Board's Decision and Order issued on January 31, 2007, and is reported at 349 NLRB No. 28. (A 1-25.)¹ Finch, Pruyn & Company, Inc. (“Finch”), and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 18 and Local 155 (“Local 18” and “Local 155” or collectively “the Union”) filed petitions for review on February 9, 2007, and April 4, 2007, respectively; and the Board filed a cross-application for enforcement on March 30, 2007. Both the petitions for review and the cross-application for enforcement were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. Both Finch and the Union have intervened, respectively, on behalf of the Board.

¹ Record citations are to the Joint Appendix, and are abbreviated as set forth in the Glossary. When a record citation contains a semicolon, references preceding it are to the Board’s findings, and references following it are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested finding that Finch violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 18 over an accommodation for requested pulp contract information.

Whether the Board reasonably dismissed the complaint allegation that Finch violated that same section of the Act by withholding requested information about prehire physical exams and drug testing.

2. Whether substantial evidence supports the Board's finding that Finch violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the pcc oiler position, and whether the Board reasonably dismissed the complaint allegation that Finch violated Section 8(a)(3) and (1) of the Act by eliminating that position and failing to recall former striker Bernard Palmer to another position.

3. Whether the Board reasonably dismissed the complaint allegation that Finch violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting pulp mill operations. Whether the Board reasonably dismissed the complaint allegation that Finch violated Section 8(a)(3) and (1) of the Act by not immediately reinstating former economic strikers.

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RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant statutory and regulatory provisions are contained in the addendum to this brief.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a consolidated complaint issued by the Board's General Counsel, pursuant to charges filed by the Union. (A 14.) The complaint alleged, in relevant part, that Finch had violated Section 8(a)(5) and (1) of the Act by failing to provide necessary and relevant information to the Union, and by unilaterally eliminating the pcc oiler position; and violated Section 8(a)(3) and (1) of the Act, by eliminating the pcc oiler position and failing to recall employee Bernard Palmer. (A 14.) The complaint also alleged that Finch had violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting the work of its pulp mill and wood yard employees. The complaint further alleged that the subcontracting prolonged the economic strike, thereby converting it into an unfair labor practice strike, and that Finch's failure to reinstate some of the strikers violated Section 8(a)(3) and (1) of the Act.

Following a hearing, an administrative law judge issued a decision to which the parties filed exceptions and cross-exceptions. (A 1.) Thereafter, the Board issued a decision and order affirming most of the judge's rulings, findings and

conclusions as modified, and adopting the recommended order as modified. (A 1.) The Board's factual findings, and its conclusions and order, are summarized below.

STATEMENT OF FACTS

1. THE BOARD'S FINDINGS OF FACT

A. Background: Finch's Business and the Parties' Collective-Bargaining History

Finch operates a pulp mill and a paper mill in Glenn Falls, New York. Historically, Finch's pulp mill has produced a unique blend of pulp made from softwood and hardwood chips cooked in an ammonium bisulfite process. Its paper mill utilizes the pulp to manufacture premium uncoated printing paper that is in demand for advertising, book publishing and business office uses. (A 1,14,16;76,78,300,302,304-307,317,339.)

Seven unions, including Local 18 and Local 155, represent Finch's workforce of approximately 600 employees. (A 1,15;58-59,353.) Local 18 represents a unit of about 300 pulp mill and wood yard employees. Local 155 represents a unit of about 149 paper mill employees. (A 1&n.3,14;79.)

Historically, Finch conducted bargaining for successor agreements with all seven unions simultaneously. But, during those negotiations, all the unions formulated and presented their individual agendas, and signed separate collective-bargaining agreements. (A 14-15;112,139-140,576,1342-1343.) The most recent

collective-bargaining agreements, before the events at issue, were in effect from June 16, 1996, to June 15, 2001. (A 14;524,626,916-918,964,1005.) During the negotiations for those agreements, Local 18 and Local 155 engaged in a 19-day economic strike that virtually crippled Finch's operations because it could not find skilled strike replacement workers for its pulp mill and wood yard. (A 387-388,1513.)

B. The Parties Commence Negotiations for Successor Contracts; Finch Develops a Strike Contingency Plan

On May 14, 2001, Finch and the Union commenced bargaining for successor collective-bargaining agreements. (A 1,15.) Robert LaBrum, the Union's International Representative, led the Union's negotiating team, and was also the chief spokesman for the other five unions. (A 91-93,95,353.) Richard Carota, Finch's President and CEO, led Finch's negotiating team. In his opening remarks, Carota proposed that Finch needed significant economic and labor cost concessions to remain competitive; but the Union resisted. (A 1&n.5,5;286289.) Carota, however, pointed out that the employees at Finch's nearby competitor, International Paper Company ("IP"), who were also represented by the Union, were receiving significantly lower wages and benefits than Finch's employees because the Union had granted economic concessions to IP. He added that this situation placed Finch at a substantial labor cost disadvantage. (A 15;308,1450.)

The negotiations were difficult. Finch “considered the possibility” that the Union might engage in a strike, and prepared a strike contingency plan to keep its papermaking process operating if a strike occurred. (A 2,19;60,363,455-456,1375.) The plan provided that Finch would not attempt to operate the pulp mill because it “needed 30 people in the wood yard to support the pulp mill and [it] couldn’t get them overnight.” (A 296-297.) The plan also provided that Finch would operate only one of its four paper machines, first by using its 1,077-ton stockpile of softwood pulp, and then by using hardwood kraft pulp purchased on the open market. The plan was based on a number of considerations, including an industry-wide recession that resulted in decreased demand for paper products and correspondingly low prices for market pulp; insufficient supervisory staff and/or the unavailability of replacement workers for the pulp mill and wood yard; and Finch’s experience with operating the pulp mill during the 19-day strike in 1996. (A 2,15,19;60,80,278,312-313,363-365,1372,1375.)

C. The Negotiations Reach Impasse on Economic Issues; Employees Begin an Economic Strike; Anticipating that the Strike Would Last 6 Months, Finch Places Spot Orders To Purchase Pulp; Newspaper Articles Indicate that the Union Knew about the Purchases

By June 14, the parties had engaged in 40 bargaining sessions, and had exchanged approximately 16 proposals, without reaching agreement on any of the economic issues, particularly on the wage and benefit concessions sought by Finch.

On that date, the Union rejected Finch's last, best and final contract offer. (A 1,15,19.)

On June 15, the existing collective-bargaining agreements expired. The parties were unable to agree on the economic issues. Finch declared impasse. With the help of unit employees, Finch began an orderly shutdown of the pulp mill. The next day, the employees represented by Locals 18 and 155 and the other five locals began an economic strike. (A 2,15,19.)

Consistent with its prestrike planning, Finch continued to manufacture paper on one of its four paper machines. That machine used 75-80 tons of pulp daily and, at that rate of usage, Finch calculated that its 1,077-ton inventory of stored softwood pulp would be exhausted in approximately one month. (A 2,15,19;280,365,1375.) Also, Finch projected that the strike would last at least 6 months because the striking employees were eligible for 26 weeks of unemployment insurance, which they would collect from mid-August 2001 to mid-February 2002. (A 2,n.7,15,16;61-62,108-109,159-160,366-368.)

On June 18, Finch began subcontracting for hardwood kraft pulp from a variety of suppliers on the open market. By July 30, Finch had placed 15 spot

orders for market pulp, with scheduled delivery dates through December 2001. (A 2,15;306;1391.)²

Finch placed spot orders because it was uncertain whether it would be able to produce quantities of paper at pre-strike levels, and sustain the high-quality of its finished products using only hardwood kraft pulp, rather than using its own softwood pulp. Finch's previous experience with purchasing small amounts of hardwood kraft pulp during shutdowns or emergencies was too limited for it to know if the approach would work on a scale needed to cover a strike that could last 6 months. (A 2&n.8,4,15,20;294-295,306,317,325-326,339.)

² The purchase and scheduled delivery dates of the 15 orders of pulp, and the suppliers were (A 1391):

<u>Order Date</u>	<u>Delivery Date</u>	<u>Supplier</u>
June 18	June 25	Int'l Forest Products Corp.
June 20	June 25-July 7	Saint Anne Pulp Sales
June 22	June 26-June 29	Exman & Co., Inc.
June 29	July 9 and August	Saint Anne Pulp Sales
June 29	July 16 and August	Int'l Forest Products Corp.
June 29	July 16	Exman & Co., Inc.
July 9	July 13-16	Mitsubishi Pulp Sales, Inc.
July 11	July 20-27	Exman & Co., Inc.
July 11	July and August	Saint Anne Pulp Sales
July 11	July 30 and August	Exman & Co., Inc.
July 25	August 20-27	Saint Anne Pulp Sales
July 30	August 20	Mead Pulp Sales
July 30	Sept.-Dec.	Domtar Pulp Sales & Mktg
July 30	Sept. 17-Oct. 29	International Paper
July 30	Sep. 24-Nov. 26	Exman & Co., Inc.

Once Finch exhausted its own supply of softwood pulp, it started running two paper machines using the purchased hardwood kraft pulp. (A 315,333.) Meanwhile, it consistently monitored its paper production and was “pleasantly surprised” that the quality of its paper products had not diminished in any manner. (A 2,15;293-295,306,325-326.) It started up the third and fourth machines around the end of July, and the beginning of October 2001, respectively. (A 315,333.)

As the strike progressed, newspapers articles confirmed not only that the parties were at a standstill on economic issues, but that the Union knew Finch was subcontracting for pulp. (A 16;103-14,134-135,148-154,155-158,722-731,1353-1354.) A July 10 newspaper article reported that Finch had exhausted its inventory of stored softwood pulp, had begun to purchase hardwood pulp from outside contractors at cheaper rates than producing its own pulp, and intended to keep the pulp mill closed indefinitely. (A 16;100,102,724.)

D. Negotiations Resume; Finch Formally Tells the Union that It Decided to Hire Replacements for the Paper Mill, and that the Pulp Mill Will Remain Closed; the Union again Indicates that It Knows Finch Is Purchasing Pulp

On September 26, the parties resumed negotiations for successor collective-bargaining agreements. (A 2;399,426-427.) On October 15, after several bargaining sessions, the Union rejected Finch’s revised last best offer. That same day, Finch notified the employees that it had begun to hire permanent replacements to support the long-term operation in all areas of its facility; but no replacements

were hired for the pulp mill, which remained idle. (A 2,16;74,110,877,1549.)

Finch, however, kept the pulp mill in a state ready for immediate activation should the strike end. (A 334.)

At a November 13 negotiating session, Local 18 inquired about the status of the pulp mill and wood yard for the first time since the strike began. (A 2,16;129.) Finch responded that it had not made a determination to reactivate the pulp mill and wood yard, as the price of purchased pulp was still below the cost of making its own pulp. (A 1515.) In a letter dated November 14, Finch reaffirmed that the pulp mill and wood yard were “down for the foreseeable future [a]ny start up appears to be months away.” (A 2,4,16;64,114,177-179,879.)

Between November 13 and 16, Finch made 6 additional spot purchases of hardwood kraft pulp. Those orders were scheduled for delivery through December 2001. (A 2&n.9;1391.)

On November 16, the Union issued a press release announcing that the strike “continues with no end in sight” and warning Finch’s customers to be “aware that Finch Pruyn has not been producing its own pulp since the start of the work stoppage, and has [instead] been utilizing purchased pulp.” (emphasis omitted) (A 1355.) It also declared the Union’s belief that Finch was “incapable of operating its pulp mill and producing its unique pulp blend without its experienced production and maintenance work force” (emphasis omitted) (A 1355.)

At the next bargaining session on November 19, the Union informed Finch that its membership had overwhelmingly rejected Finch's last revised offer. The Union counter-proposed that if Finch was serious about reaching an agreement, it should eliminate the maintenance of membership provision from its offer, reinstate the union security clause, modify the pension benefit by permitting employees to lump out after 25 years, and provide amnesty to all strikers. Finch rejected the proposal, but agreed to extend its revised offer so that the Union could conduct a revote. (A 16.)

E. The Parties Enter into Successor Contracts and Striker Recall Agreements; the Strike Ends; Finch Keeps the Pulp Mill Closed and Resumes Subcontracting for Pulp; the Union Fails To Request Bargaining over the Continued Closure of the Pulp Mill

On November 21, 2001, the employees ratified Finch's revised last, best contract offer, and the strike ended. (A 2,16;117,119.) On November 24, Local 18 and Local 155 simultaneously signed separate successor collective-bargaining agreements with Finch, which were effective through December 31, 2006. (A 2,16;377,524,576.) On November 26, the Unions signed separate but identical striker recall agreements, which provided that "[u]nreinstated strikers will be recalled when permanent vacancies arise" under three circumstances, namely, if: (1) "an active employee permanently leaves" and management elects to fill the position; (2) a new permanent job is established; or (3) Finch "resumes other operations and management elects to fill the position." (A 2;710,712.)

On December 18, Finch began a new round of subcontracting, by making further individual spot orders for pulp. However, Finch continued to maintain its pulp mill in condition ready for activation. (A 6;62.)

Between December 2001 and December 2002, Finch made a total of about 85 post-strike spot purchases of pulp from various suppliers. (A 2;1453.) On February 26 and April 17, 2003, Finch informed employees that it intended to reopen the pulp mill in June 2003, due to the rising market price of pulp and the time and cost of recertifying the pulp mill if it remained closed. (A 2;291-292,735,1438.) In June 2003, Finch reopened the pulp mill and recalled a majority of the pulp mill employees to their prestrike positions. (A 2;285-286,328,336-337.)

F. Finch Refuses To Bargain over an Accommodation Concerning Local 18's Request for Copies of Pulp Contracts; Finch Denies Requests by Locals 18 and 155 for Information about Job Applicants' Pre-Hire Physical Exams and Drug Testing

Meanwhile, in January 2002, after the strike ended, Local 18 requested copies of Finch's pulp-purchasing contracts, stating that the information was "relevant to helping [it] restore [its] members to their respective jobs." (A 16;65,414-418,898.) Finch refused the request, claiming that its pulp contracts were confidential financial data, and that Local 18 had not established the relevance of the requested information. (A 901.) Subsequently, Local 18 repeated its request, stating that it was "agreeable for now [to] eliminating the dollar

amounts from the contracts.” (A 902.) Finch again refused the request. (A 17;910.)

In February and March, Local 18 and Local 155 requested that Finch provide them with information about the dates, times and places where applicants for striker replacement positions were given pre-hire physicals and drug tests. Finch refused, claiming that the requested information was confidential information, and not relevant to the Unions’ representational responsibilities. (A 16;65,414-418.) The Union asserted that its request was based on safety concerns and/or to ensure that Finch did not discriminate against union-affiliated applicants, but gave no support for its claims. Finch reiterated that the Union had failed to show the relevance of the requested information, but confirmed that all the new hires took the pre-hire physicals and drug tests, as well as the testing locations and the testers’ identities. (A 7,17;419.)

G. After the Strike Ends, Finch Unilaterally Eliminates the Pcc Oiler Position Previously Held by Bernard Palmer and; in Accordance with the Negotiated Seniority List and the Striker Recall Agreement, Finch Recalls a More Senior Former Striker Rather than Palmer for a Vacant Position

Finch hired Bernard Palmer as a paper mill employee in 1966. (A 266.) In 1983, Palmer became a basement oiler,³ a position in which he was responsible for

³ Finch employs two categories of oilers in its papermaking facility: the “basement oilers,” who work regular day shifts; and the “tour oilers” or “machine room

lubricating gearboxes, pumps, and other equipment in all areas of the papermaking facility, including in the machine room, the precipitated calcium carbonate (“pcc”) area, the equipment and material handling area, and the warehouse. Palmer worked an 8-hour shift and his responsibilities in the pcc area took him one hour daily. (A 8;257-258,261,263-264.)

Palmer was an avid member of Local 155, who, at various times, served as union shop steward, vice president, and president. (A 8;246,257,259.) In May 1997, Finch suspended Palmer for 4 months, allegedly for sabotaging a paper machine. Local 155 filed a grievance over the suspension. An arbitrator ultimately found that Finch lacked just cause for the suspension, and awarded Palmer backpay with restoration of his seniority rights for the period that he was suspended. The arbitrator did not order Finch to return Palmer to his basement oiler position. (A 8,18,22;262,929,963.)

In September 2001, when Palmer’s suspension ended, Finch assigned him to a newly-created pcc oiler position, with the sole task of oiling the machines in the pcc area for one hour daily. (A 8&n.29,18,22;262,263,402-403,929.) For 4 years, Finch continued to classify Palmer as a basement oiler; listed him on the “Basement Oilers [shift] Schedule;” and paid him for a full 8-hour day, at the hourly wage rate for basement oilers. Twice Palmer requested more work than the

oilers,” who work on rotating shifts. The oilers perform interchangeable duties. (A 18&n.6;261-267,1104.)

hour-a-day pcc oiler duties. But Finch, still concerned about the safety of its paper machines, refused, and the Union never protested or filed a grievance over the assignment of Palmer to the pcc oiler position. (A 8,18;88-90,263-264,267,269,276,1104.)

Palmer participated in the June-November 2001 strike. At the end of the strike, Finch recalled many of the paper mill employees to their prestrike positions. It did not recall Palmer. Rather, it transferred the pcc oiler duties to a machine room position.⁴ Finch, however, did not bargain with Local 155 over its decision to eliminate the pcc oiler position. (A 8;84,246-247,407.)

In January 2002, a permanent replacement worker left, creating an available tour oiler position in the paper mill's machine room. At a meeting to discuss filling that position, Finch's Human Resource Director, Michael Strich, told Local 155 that Palmer would not be allowed back in the machine room, and he mentioned "the arbitration award." (A 84,87,247.) Relying on the prestrike "Department Seniority List," as well as on the machine oiler schedule and the parties' strike recall agreement, Finch recalled unit employee Peter Peceu, who was the most senior laid-off worker, to fill the vacant position. (A 9&n.32,23;83, 246-247,407,712,730,1104.)

⁴ The basement oilers and machine room oilers have similar duties, and both groups of employees performed the pcc oiler duties prior to the creation of the pcc position. (A 411-412.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Schaumber and Walsh) found, in disagreement with the administrative law judge, that Finch violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union over an accommodation for the provision of relevant pulp contract information. (A 1,6-7,16-18.) In disagreement with the judge, however, the Board found, that Finch did not violate the same section of the Act by refusing to furnish the Union with information regarding pre-hire physical exams and drug testing. (A 1,8,10&n.3.)

The Board (Chairman Battista and Members Schaumber and Walsh) also found, in disagreement with the judge, that Finch violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the pcc oiler position held by paper mill employee Bernard Palmer. (A 8-9,18.) In agreement with the judge, however, the Board (Chairman Battista and Member Schaumber; Member Walsh reserving) found that Finch did not violate Section 8(a)(3) and (1) of the Act by eliminating Palmer's position or by failing to recall him to another available position. (A 1,9&n.32,10&n.3,18.)

The Board (Chairman Battista and Member Schaumber; Member Walsh dissenting) also found, in agreement with the judge, that Finch's subcontracting for pulp was a lawful temporary measure to maintain its operations during the

economic strike, rather than a permanent decision. Accordingly, the Board dismissed the complaint allegation that Finch violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting for pulp during the strike. Further, based on its finding that the subcontracting during the strike was lawful, the Board found that the strike did not convert into an unfair labor practice strike, and therefore that the strikers remained economic strikers. Accordingly, the Board dismissed the complaint allegation that Finch violated Section 8(a)(3) and (1) of the Act by recalling the former economic strikers in accordance with the parties' negotiated recall agreement. (A 1,4,9&n.32,10&n.3,18-22.) The Board (Chairman Battista and Member Schaumber; Member Walsh reserving) further found, in agreement with the judge, that Finch did not violate Section 8(a)(5) and (1) of the Act by failing to bargain with Local 18 about its post-strike decision to subcontract for pulp because the Union never requested bargaining over that new decision. (A 1,5-6,10&n.3,18-22.)

The Board's order requires Finch to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (A 7,8-9.) Affirmatively, the Board's order requires Finch to rescind the unlawful unilateral elimination of the pcc oiler position; to offer Bernard Palmer full reinstatement to his former pcc oiler job, without prejudice to

his seniority or any other rights or privileges previously enjoyed; to make him whole; to notify and upon request bargain collectively and in good faith with Local 155 before changing unit employees' terms and conditions of employment; and to post an appropriate remedial notice. (A 9.)⁵

SUMMARY OF ARGUMENT

This case involves competing petitions for review by Finch and the Union, which each lost part of a case that centers on actions that the parties took during and after an economic strike by pulp and paper mill employees, who were represented by Locals 18 and 155, respectively. The key issues can be summarized as follows.

For its part, Finch does not challenge the Board's finding that it violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with requested information about contracts to purchase pulp; accordingly, the Board is entitled to summary enforcement. Instead, Finch raises only two challenges, which for the most part are not properly before the Court. First, Finch contests the Board's reasonable finding that it further violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating a pcc oiler position after the strike. However, nowhere in

⁵ The Board found no affirmative remedial order was necessary for Finch's refusal to provide requested information because, prior to the issuance of the order, Finch had supplied the contracts pursuant to subpoena. The Board found, however, that Finch's compliance with the subpoena did not moot the violation since an employer has a duty to timely respond to an information request. (A 7&n.26.)

the proceedings before the Board did Finch present most of the contentions that it raises for the first time here, including its newly-minted challenge to the Board's remedial order. Accordingly, under Section 10(e) of the Act, the Court lacks jurisdiction to consider Finch's claims. Second, Finch challenges the Board's reasonable finding that its decision to subcontract pulp operations *after* the strike was a mandatory subject of bargaining. Finch, however, is also precluded from mounting that challenge here, for the simple reason that it prevailed before the Board, which dismissed the relevant Section (8)(a)(5) and (1) complaint allegation against Finch on the ground that the Union had failed to demand bargaining on the subject. As the prevailing party, Finch is not aggrieved and therefore lacks standing to challenge an underlying rationale of which it disapproves.

For its part, the Union premises the bulk of its arguments on a view of the facts that differs from the Board's. According to the Union, during the strike, Finch purportedly made a decision to permanently close its pulp mill and subcontract for pulp instead, and presented this supposed decision to Local 18 as a *fait accompli*. The Union then argues that this alleged refusal-to-bargain converted the strike into an unfair labor practice strike, and therefore that Finch violated Section 8(a)(3) and (1) of the Act by not immediately recalling the pulp mill employees when the strike ended. Further compounding its error, the Union asserts that Locals 18 and 155 bargained jointly and, therefore, that the striking

paper mill employees were also unfair labor practice strikers. The Board, however, appropriately rejected, not only the Union's joint bargaining claim, but also its central premise that Finch decided during the strike to engage in permanent subcontracting. Rather, as the Board reasonably found, Finch's spot purchases of pulp were lawful, temporary measures that Finch undertook to deal with the exigencies of an economic strike.

STANDARD OF REVIEW

When the Board engages in “the ‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management . . . , the balance struck by the Board is ‘subject to limited judicial review.’” *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957)). In particular, “because ‘classification of bargaining subjects as “terms or conditions of employment” is a matter concerning which the Board has special expertise’ . . . its judgment as to what is a mandatory bargaining subject is entitled to considerable deference.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 685-86 (1965)). As such, the Board's construction of the Act should be upheld if it is “reasonably defensible.” *Id.* at 497.

Under Section 10(e) of the Act, the Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. A reviewing court

“may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Noel Foods, a Div. of Noel Corp. v. NLRB*, 82 F.3d 1113, 1117 (D.C. Cir. 1996).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT FINCH VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH LOCAL 18 OVER AN ACCOMMODATION FOR REQUESTED PULP CONTRACT INFORMATION, AND THE BOARD REASONABLY DISMISSED THE COMPLAINT ALLEGATION THAT FINCH UNLAWFULLY WITHHELD REQUESTED INFORMATION ABOUT PRE-HIRE PHYSICAL EXAMS AND DRUG TESTING

After the strike ended, Locals 18 and 155 made two information requests that were the subject of complaint allegations. As to the first--a request for information about pulp contracts--the Board found a Section 8(a)(5) and (1) violation,⁶ which Finch, on review, does not contest. As to the second--a request for information about physicals and drug testing on applicants for strike replacement jobs--the Board dismissed the complaint allegation. We show below

⁶ An employer that violates Section 8(a)(5) also commits a “derivative” violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise” of their rights under the Act. *Metropolitan Edison*, 460 U.S. 693, 698 (1983); *Brewers and Maltsters, Local No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

that the Board is entitled to summary enforcement of the uncontested violation, and that the Board reasonably dismissed the second complaint allegation.

A. The Court Should Summarily Enforce the Board's Uncontested Finding that Finch Violated Section 8(a)(5) and (1) of the Act by Refusing To Bargain with Local 18 Over an Accommodation for Requested Pulp Contract Information

Attempting to learn more about Finch's post-strike subcontracting of pulp mill work, Local 18, on January 23, 2002, requested copies of Finch's pulp contracts, asserting that they were relevant to helping the Union restore employees to their jobs. Finch denied the request on confidentiality and relevancy grounds. In a second letter, Local 18 sought to further establish relevancy and to accommodate Finch's asserted confidentiality concerns, by asserting that it needed the contracts to determine whether Finch "had adequate justification for failing to recall strikers to their jobs in the pulp mill," and that it was agreeable to Finch's elimination of the dollar amounts from the contracts. Finch again declined to furnish the information. The Board found that the information was relevant and necessary to Local 18's ability to assess and enforce the unit employees' recall rights, and that Finch violated Section 8(a)(5) and (1) of the Act by failing to bargain with Local 18 over an accommodation for the provision of the requested information. (A 6-7.)

In its opening brief, Finch does not contest the Board's finding that it violated Section 8(a)(5) and (1) of the Act, by failing to bargain with Local 18 over an accommodation for the provision of requested pulp contract information. (A 7.) An employer's failure to address or take issue with the Board's findings and conclusions with regard to a violation of the Act "effectively results in abandonment of the right to object to that determination." *NLRB v. Kentucky May Coal Co., Inc.*, 89 F.3d 1235, 1241 (6th Cir. 1996). *Accord W.C. McQuaide, Inc. v. NLRB*, 133 F.3d 47, 49 (D.C. Cir. 1998); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997). Accordingly, the Board is entitled to summary enforcement of the portion of its order that is based on its uncontested finding. *See Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006); *Carpenters and Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. 2007).

B. The Board Reasonably Dismissed the Complaint Allegation that Finch Violated the Act by Denying the Requests of Locals 18 and 155 for Information Concerning Striker Replacements' Prehire Physical Exams and Drug Testing

Asserting that it had concerns about workplace safety, the Union requested that Finch provide the dates, times, and places where applicants for striker replacement jobs were given pre-hire physical exams and drug tests, as well as the names of the individuals tested. Finch refused, arguing that such information was not relevant to the Union's representational responsibilities, and was confidential. Nonetheless, Finch did inform the Union that all of the newly hired replacement

workers had taken the pre-employment physicals and drug tests, and it identified the locations where the testing occurred and the entity that performed the tests.

The Board found that, since prehire drug and alcohol testing of job applicants is not a mandatory subject of bargaining, the Union was required to demonstrate the probable relevance of the requested information, which it failed to do. (A 7-8.)

Accordingly, the Board dismissed the complaint allegation that Finch violated Section 8(a)(5) and (1) of the Act by withholding the requested information about striker replacements' prehire physicals and drug testing. (A 8.)

Although an employer's duty to bargain includes the duty to furnish relevant information needed for the proper performance of the union's representation role, a union's assertion that it needs certain information does not automatically require the employer to supply it. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303, 314 (1979). Rather, the employer's duty to supply information turns on the circumstances of the particular case. *Id.* Whereas certain information concerning unit employees is presumptively relevant, a union is entitled to information about non-unit employees only if the union can show that it is relevant to the performance of its duties. *See DaimlerCrysler Corp. v. NLRB*, 288 F.3d 434, 443 (D.C. Cir. 2002) (citing *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437, 455-46 (1967)).

Here, the Union requested information about applicants for striker

replacement positions--namely the dates, times and places where they were given physicals and drug tests, as well as their names. As the Board found (A 7), “[p]rehire drug and alcohol testing of applicants is not a mandatory subject of bargaining, and therefore information concerning such testing is not deemed presumptive relevant.” *See Tribune Star*, 295 NLRB 543, 548-49 (1989).

The record amply supports the Board’s finding that the Union failed to demonstrate the probable relevance of the requested information about pre-hire physicals and drug testing for applicants seeking jobs as striker replacements. As the Board found (A 7), although Finch expressed legitimate confidentiality concerns regarding the requested information, it nonetheless informed the Union that all the new hires had undergone the pre-employment tests, and it also identified the locations where the testing took place and who conducted the tests.

Before the Board, the Union claimed primarily that its request was based on safety concerns; it argued that it needed to confirm that all replacement employees underwent drug screening. As the Board found (A 7), however, the Union provided no support for its claim that Finch failed to uniformly require screening of job applicants. Rather, the Union simply asserted (A 7) that Finch’s hiring was done amid “haste and confusion.” And, although the Union alleged two “near miss” accidents that had occurred at the facility, the Board found (A 7-8) that it failed to establish any link between those incidents and the lack of pre-hire testing.

The Union also alleged that it needed the information to ensure that Finch was not discriminating against union-affiliated applicants. The Board, however, found (A 8) that the Union failed to present any evidence even suggesting such discrimination. Thus, as the Board noted (A 8), the instant case is distinguishable from *Mid-Continent Concrete*, 336 NLRB 258 (2001), *enfd.*, 308 F.3d 859 (8th Cir. 2002) where, unlike here, the union established relevance by informing the employer of the factual basis underlying its claim of antiunion discrimination.

The Union now claims (Br 32) that it needed the information to ascertain whether Finch had in fact hired the replacement workers in the paper mill on a permanent basis, because if Finch “did not mandate that the replacements take the tests under its normal practices, the job offers did not exhibit the characteristics of permanent employment.” The Union, however, failed to make this novel claim before the Board. It is therefore barred from raising the contention for the first time on review. *See* Section 10(e) of the Act (“No objection that has not been urged before the Board . . . shall be considered by the court”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (argument not raised before the Board not properly before the Court). *Accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 105-06 (D.C. Cir. 2002); *Seattle Opera v. NLRB*, 292 F.3d 757, 764, n.7 (D.C. Cir. 2002).

In these circumstances, the Board reasonably found (A 8&n.28) that Finch

was not required to parse out the Union's demands as including two separate requests, and to provide replacements' names alone.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT FINCH VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY ELIMINATING THE PCC OILER POSITION, AND THE BOARD REASONABLY DISMISSED THE COMPLAINT ALLEGATION THAT FINCH VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ELIMINATING THAT POSITION AND FAILING TO RECALL FORMER STRIKER BERNARD PALMER TO ANOTHER POSITION

There are two complaint allegations related to Finch's post-strike elimination of the paper mill pcc oiler position that was held by employee Bernard Palmer before the strike. The first is that Finch violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the pcc oiler position without giving Local 155 prior notice and an opportunity to bargain. The Board found--based on the application of well-settled precedent to the circumstances of the case--that the pcc oiler position had become an implied term of employment, and that Finch's unilateral elimination of that position violated the Act. (A 8-9.) We show below that substantial evidence supports the Board's finding, and that virtually all of the challenges raised by Finch are new claims that are barred by Section 10(e) of the Act.

The second complaint allegation was that Finch violated Section 8(a)(3) and (1) of the Act by eliminating the pcc oiler position, and by failing to recall Palmer

to an available oiler position because of his union activities. The Board found that the General Counsel failed to meet his burden of showing that Finch was motivated by antiunion considerations when it eliminated the pcc oiler position and failed to recall Palmer to another position. (A 9&n.32,22-23.) As we show, the Board reasonably dismissed that complaint allegation.

A. Substantial Evidence Supports the Board’s Finding that Finch Violated Section 8(a)(5) and (1) of the Act by Unilaterally Eliminating the Pcc Oiler Position

1. An employer may not unilaterally change an established employment practice

It is settled that a practice not included in a written contract may become an implied term and condition of employment, and therefore a mandatory subject of bargaining, through a consistent pattern of conduct. *See Bonnell/Tredegar Ind. v. NLRB*, 46 F.3d 339, 345 (4th Cir. 1995); *Riverside Cement Co.*, 296 NLRB 840, 841 (1989). Once established, a unilateral change in that practice can be “unlawful whether or not it is also a breach of contract.” *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 832 (D.C. Cir. 1982) (unilateral change in “established practice” of using union and nonunion employees in work assignments unlawful); *Office & Professional Employees Int’l Union, Local 425 v. NLRB*, 419 F.2d 314, 321 (D.C. Cir. 1969) (a 4-year non-contractual practice of using selected unit employees to perform audits became an established term and condition of employment that employer could not unilaterally change); *Sacramento*

Union, 258 NLRB 1074, 1074 (1981) (regularly observed priority list system for job assignments is an implied term, even though the “practice[] may have constituted a deviation from the letter of the parties’ agreement”).

Generally, an employer may not unilaterally change mandatory subjects of bargaining without first providing its employees’ bargaining representative notice and an opportunity to bargain concerning the proposed changes. *See NLRB v. Katz*, 396 U.S. 736, 741-48 (1962); *May Dept. Stores v. NLRB*, 326 U.S. 376, 385 (1945). The statutory duty to bargain is independent of any obligation that the employer may incur under a collective-bargaining agreement. *Road Sprinkler*, 676 F.2d at 831. *Accord NLRB v. Pepsi-Cola Distributing Co.*, 646 F.2d 1173, 1175-76 (6th Cir. 1981).

2. The Board reasonably found that the pcc oiler position was an implied term of employment that Finch could not unilaterally eliminate

There is no dispute that for 4 years, Finch had maintained a pcc oiler position in the paper mill that was held by long-term employee Palmer until the beginning of the strike. At the end of the strike, however, instead of recalling Palmer, Finch transferred the duties of the pcc oiler position to another oiler position, thus effectively eliminating that job without first notifying the Union and bargaining over the change. Indeed, Finch does not deny that it failed to provide the Union with notice and an opportunity to bargain over the decision. Rather,

Finch merely announced the change as a fait accompli, by informing the Union, at a January 2002 meeting, that it would not be recalling Palmer and by never filling that position. (A 84,87,247.)

Based on the foregoing, the Board reasonably found (A 8-9) that Finch violated Section 8(a)(5) and (1) of the Act by eliminating the pcc oiler position without giving Local 155 prior notice and an opportunity to bargain over the change. The Board has long held that “the elimination of unit jobs . . . is a matter within the statutory phrase ‘other terms and conditions of employment’ and is a mandatory subject of bargaining within the meaning of Section 8(a)(5) of the Act.” *Plymouth Locomotive Works*, 261 NLRB 595, 602-03 (1981). Indeed, an employer’s elimination of bargaining unit jobs is the very paradigm of a forbidden unilateral change under the Act, for “[n]othing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining.” *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961). *Accord Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735 (3d Cir. 1978) (same).

Because Finch never gave notice to Local 155 before implementing the change described above, the Board reasonably determined (A 8-9) that Finch’s unilateral action deprived the Union of a meaningful opportunity to bargain over changes affecting the terms and conditions of employment, and therefore

constituted a violation of Section 8(a)(5) and (1) of the Act. *See Fivecap, Inc. v. NLRB*, 294 F.3d 768, 790 (6th Cir. 2002) (elimination of bargaining unit data entry position and consolidation of the duties of that position with another were mandatory subjects of bargaining, and employer violated the Act by failing to notify and bargain with union about those changes).

The Board properly rejected Finch's claim (Br 27-28) that it did not eliminate the pcc oiler job, but merely "elected" not to fill it. As the Board found (A 8), there is no meaningful distinction between a position that Finch will never fill, and a position that has been formally eliminated; either one is equivalent to the "curtailment of unit work," and as such is a forbidden unilateral change under the Act. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d at 176. *See also Brockway Motor Trucks v. NLRB*, 582 F.2d at 735 ("It is in fact difficult to imagine any result of a [unilateral] decision by the employer about which labor would be more highly sensitized" than the loss of jobs); *Challenge-Cook Bros.*, 288 NLRB 387, 387 n.1, 401 (1988) (same).

Finch erroneously assumes (Br 25) that the Board "deem[ed] the pcc oiler position an 'implied term'" of the parties' 1996-2001 collective-bargaining agreement, and opines (Br 30-32) that the Board's finding of an established practice turns on an "untenable" interpretation of that contract. The Board, however, did not base its finding on that agreement. Rather, as the Board

specifically noted (A 8&n.31), the pcc oiler position existed outside the agreement, and had become an implied term and condition of employment based on the parties' established practice. Interestingly, Finch's own declarations support the Board's finding. Finch admits (Br 31-32) that "undisputed record evidence shows that both Finch and Local 155 had an 'established practice' of treating Palmer as a basement oiler with pcc duties." Moreover, as Finch also points out (Br 16), the Union never protested or filed a grievance over Palmer's assignment to the pcc oiler job during the 4 years that he held it. Such mutual acquiescence proves that the pcc oiler position had ripened into an established commitment, and thus became an implied term of employment. *See Keystone Steel & Wire, Div. of Keystone Consol., Inc. v. NLRB*, 41 F.3d 746, 749 (D.C. Cir. 1994) (under the implied term theory, an employer's past practice that is endorsed by the parties' mutual acquiescence can become established as a term and condition of employment subject to the duty to bargain).

To support its incorrect assumption that the Board addressed the contract interpretation issue, Finch (Br 28-29) partially quotes out of context the administrative law judge (A 23), where he stated that whether Finch should have recalled Palmer is "nothing more than a differing and arguable interpretation over the meaning of the recall agreement." What the judge actually found (A 23) was that "while the General Counsel alleges that Palmer is senior to employee Peter

Peceu and should have been recalled first to the vacant machine oiler position, this is nothing more than a differing and arguable interpretation over the meaning of the recall agreement.” The judge’s observation thus had nothing to do with the Section 8(a)(5) complaint allegation. Rather, the judge was addressing the different complaint allegation that Finch violated Section 8(a)(3), and discriminated against Palmer, by recalling Peceu first; the General Counsel had claimed that Palmer had more seniority under the recall agreement. Thus, the judge’s discussion of how to interpret the recall agreement has no relevance to the Section 8(a)(5) unilateral change violation at issue here.

3. Finch’s remaining claims are not properly before the Court

In challenging the Board’s finding that Finch violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the pcc oiler position, Finch also argues (Br 25-26) that the integration clause in the parties’ agreement extinguished all past practices because the position is not mentioned in the list of job classifications appended to the agreement. Under Section 10(e) of the Act, however, the Court lacks jurisdiction to consider this objection because Finch never raised it before the Board, either in its answering brief or by way of a motion for reconsideration under 29 C.F.R. § 102.48(d)(1). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. at 665-66.

In any event, Finch has presented no evidence to show that, by agreeing to the integration clause, the Union gave up its right to bargain over the elimination of this long-standing pcc oiler position. In that regard, Finch's reliance (Br 26) on *IBEW, Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1985), is misplaced. In that case, the Court held that "the union explicitly and unmistakably agreed to eliminate the Christmas bonus as a term or condition of employment when it accepted the integration sentence of the zipper clause and, therefore, lost any bargaining rights regarding its elimination." *Id.* at 156. In reaching that conclusion, the Court relied on the evidence of the parties' bargaining history, showing that the employer not only announced its intention "to terminate every preexisting agreement or understanding between itself and the union and to 'wipe the slate clean' by adoption of the new agreement," but it also explicitly informed the union that both parties were free to make proposals during the negotiations; and that those proposals could include matters that have been included in the parties' prior side agreements that the union wished to continue. *Id.* at 154. Because the union accepted the employer's proposed integration sentence, notwithstanding the concededly broad scope of the intended coverage, the Court found that the union accepted the termination of the covered practices, including the Christmas bonus. *Id.* at 155.

Likewise, Finch did not argue before the Board, as it does here (Br 28-30), that it lawfully refused to bargain with Local 155 because it had a “sound arguable basis” for interpreting the collective-bargaining agreement as eliminating the pcc oiler position. Rather, Finch’s only assertion before the Board was simply that it was not “contractually obligated to have a pcc position.” (A 1587-1588.) Further, Finch (Br 30) errs in belatedly relying on *NCR Corp.*, 271 NLRB 1212 (1984), to note its agreement with the judge’s finding (A 23) that, in the absence of antiunion motivation, Finch’s reasonable application of its recall agreement was not an unfair labor practice. As shown above (pp. 34-35), the judge (A 23) was only addressing Finch’s defense to the Section 8(a)(3) allegation, which was that its interpretation of the recall agreement gave it a legitimate, nondiscriminatory reason to recall Peceu over Palmer.

Finally, the Court lacks jurisdiction to consider Finch’s claim--which it makes for the first time here--that the Board has no authority to issue an order imposing a substantive contract term (Br 21, 23-24), and that the Board’s remedial order is punitive and overbroad (Br 33). In the proceedings below, Finch utterly failed to raise any challenges to the Board’s remedial order, let alone the generic sort of objection that would also have failed to preserve the issue for appellate review. *See Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497 (D.C. Cir. 1996). Nor did Finch file a motion for reconsideration of the

Board’s order, as it was entitled to do; by failing to file that motion, Finch “waived its challenge to the Board’s remedy and deprived [the Court] of any jurisdiction to consider it.” *See W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008), and cases cited. In sum, because Finch never made its arguments to the Board in the first instance, they “come[] too late and must be rejected. *Id.*⁷

B. The Board Reasonably Dismissed the Complaint Allegation that Finch Violated Section 8(a)(3) and (1) of the Act by Eliminating the Pcc Oiler Position, and by Failing to Recall Bernard Palmer to Another Oiler Position

The Board, in agreement with the administrative law judge, reasonably dismissed the complaint allegation that Finch eliminated the pcc oiler position held by Palmer prior to the strike, and refused to recall him, because of his union activities. (A 9&n.32,23.) Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), the General Counsel must first show that the employee’s “protected conduct was a motivating factor in the employer’s decision” to take an adverse employment action. *Id.* at 1089. “Once this is established, the burden . . .

⁷ In any event, whether Palmer is available for reinstatement, and whether the parties have resolved the issue, are matters properly deferred to the compliance phase of these proceedings. *See Hagar Management Corp.*, 313 NLRB 438, 438 n.1 (1993) (post-decisional events affecting remedy are “best left to the compliance stage of the proceedings”), *enfd.*, 55 F.3d 684 (D.C. Cir. 1995). *Accord Huck Store Fixture Co. v. NLRB*, 327 F.3d 528 (7th Cir. 2003) (courts leave remedial details to compliance); *NLRB v. Rockwood Energy and Mineral Corp.*, 942 F.2d 169, 176 (3d Cir. 1991) (same).

shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Id. Accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125-26 (D.C. Cir. 2001). In such cases, the central question is whether the adverse employment action was motivated by anti-union animus. *See Wright Line*, 251 NLRB at 1083-84. *Accord NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 398-400 (1983); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135 (D.C. Cir. 2003). This Court has emphasized that it grants the Board “even greater deference with respect to questions of fact that turn upon motive.” *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

The Board reasonably found (A 9&n.32), in agreement with the administrative law judge (A 22-23), that the General Counsel failed to establish that Finch was motivated by antiunion considerations when it eliminated the pcc oiler job and failed to recall him to another job. As the judge found (A 22), at the end of the strike, Finch decided that the pcc oiler duties, which had taken Palmer approximately 10 percent of his time to perform, could be done more efficiently as part of the responsibilities of the tour oilers, who possessed the same skills. Accordingly, the judge found (A 23) that Finch’s decision to assign the pcc oiler duties to the tour oiler position was based on legitimate business reasons unrelated to any animus against Palmer’s union activities. (Of course, Finch’s failure to notify Local 155 and bargain over the decision did violate Section 8(a)(5) and (1),

as shown above, pp. 29-35).

Likewise, the Board found (A 9&n.32), in agreement with the judge (A 22-23), that the General Counsel failed to show that Finch's refusal to recall Palmer to an available oiler position was motivated by animus against his union activities. Rather, as the Board found (A 23), Palmer testified that Peter Peceu, the employee who was recalled for the available position, was ahead of him on the updated seniority list; and the Union's Secretary/Treasurer Ronald Gates testified that Peceu was the most senior laid-off worker on the post-strike department seniority list and the oiler schedule (A 86-87,272-273,1104). Given that evidence, the Board reasonably found (A 23) that Finch properly relied on the recall procedures of the parties' striker recall agreement (A 712) to determine that Peceu, not Palmer, was the senior machine room oiler, and recalled him ahead of Palmer for that neutral reason.

The Union argues (Br 33) that the Board ignores evidence that Palmer had a "turbulent relationship" with Finch because of his union activism. The only "evidence" cited (Br 33) by the Union to support its claim of union animus is a statement by Finch's Human Resource Director Strich, during a January 2002 meeting, that Palmer would not be recalled because he would be "a distraction in the machine room." (A 83-84,86-87,247.) In that same statement, Strich also mentioned the 1997 arbitration award in which the arbitrator did not order Finch to

return Palmer to the machine room after he was suspended for allegedly sabotaging one of the machines. Therefore, rather than proving union animus, the inference is strong that Strich's statement merely represented Finch's continued concern about returning Palmer to the same section of the mill where he had allegedly engaged in an act of sabotage. Accordingly, the Board reasonably dismissed the complaint allegation that Finch failed to recall Palmer because of his union activities.

III. THE BOARD REASONABLY DISMISSED THE COMPLAINT ALLEGATION THAT FINCH VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY SUBCONTRACTING PULP MILL OPERATIONS; ACCORDINGLY, THE STRIKE REMAINED ECONOMIC, AND THE BOARD REASONABLY DISMISSED THE COMPLAINT ALLEGATION THAT FINCH VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY NOT IMMEDIATELY REINSTATING FORMER STRIKERS

A. Overview of the Board's Findings and the Parties' Contentions

The Board reasonably found (A 2,15) that the strike, which admittedly began as an economic measure, remained so for the duration, because Finch's decision to purchase pulp and thereby maintain its papermaking operations during the strike was a lawful temporary measure. The Union (Br 6-8) challenges that finding by claiming that during the strike, Finch made a unilateral decision to subcontract its pulp operations permanently. Based on that alleged Section 8(a)(5) and (1) violation, the Union further contends (Br 18-20) that the strike converted to an unfair labor practice strike. As shown below pp. 34-50, however, the Board

reasonably rejected the Union's preferred view of the evidence concerning Finch's subcontracting, and therefore also appropriately found that the strike remained economic in nature.

The Union (Br 21, 24-29) bases most of its remaining arguments, not only on its mistaken factual inference that Finch made a decision during the strike to permanently subcontract its pulp operations, but also on its equally erroneous contention that Local 18, which represented the pulp mill employees, engaged in joint bargaining with Local 155, which represented the paper mill employees. Relying on that misguided premise, the Union argues (Br 18-21) that the Local 155-represented paper mill employees piggybacked on the supposed unfair labor practice striker status of the Local 18-represented employees. We show below (pp.51-55) that the Board reasonably rejected that argument as well, although the Court need not reach the issue so long as it agrees with the Board that Finch's subcontracting during the strike was a lawful temporary measure.⁸

With respect to Finch's decision after the strike ended in November 2001 to purchase pulp for an additional 19 months, rather than reopen the pulp mill, the Board reasonably found (A 4-5) that it was made separately. Further, the Board (A

⁸ The Union also argues (Br 24-32) that even if the paper mill employees remained economic strikers, Finch separately violated Section 8(a)(3) and (1) of the Act by misleading the Union about the status of workers hired to replace them during the strike. As shown below, however, the Board (A 3&n.13,24) reasonably rejected the Union's allegation because it fell outside the scope of the General Counsel's complaint.

4-5) appropriately concluded that, because Finch based its post-strike decision in large measure on labor cost considerations, the decision involved a mandatory subject that was amenable to resolution through the collective- bargaining process. The Board (A 5-6), however, reasonably dismissed the complaint allegation that Finch violated Section 8(a)(5) and (1) of the Act by refusing to bargain over its post-strike decision because, as the Board found, Local 18--which knew in advance about the post-strike subcontracting--failed to demand bargaining over it.

We show below (pp. 55-67) that substantial evidence supports the Board's finding that Local 18 waived its right to demand bargaining over Finch's decision to engage in post-strike subcontracting. We also show that Finch--as the prevailing party with respect to that Section 8(a)(5) and (1) complaint allegation--lacks standing to challenge an aspect of the Board's underlying rationale with which it disagrees. We further show that, in any event, the Board reasonably characterized Finch's post-strike subcontracting as one involving a mandatory bargaining subject.

B. The Board Reasonably Found that Finch's Subcontracting during the Economic Strike was a Lawful Temporary Measure, and Therefore that Finch Lawfully Recalled the Former Economic Strikers in Accordance with the Parties' Negotiated Recall Agreements

1. An employer may temporarily subcontract work to maintain its operations during an economic strike

It is settled that during an economic strike, an employer may unilaterally take temporary measures to maintain its business operations. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *Land Air Delivery v. NLRB*, 862 F.2d 354, 359 n.6 (D.C. Cir. 1988); *Cyanamid Co. v. NLRB*, 592 F.2d 356, 360-61 (7th Cir. 1979). Of particular relevance here, an employer confronting an economic strike may subcontract unit work temporarily. *Naperville Ready Mix v. NLRB*, 242 F.3d 744, 756 (7th Cir. 2001); *Fairfield Tower Condo. Assn.*, 343 NLRB 924, 924, 929 (2004); *Land Air Delivery*, 286 NLRB 1131, 1131-32 (1987), *enfd.*, 862 F.2d 354 (D.C. Cir. 1988). Otherwise stated, an employer has no duty to bargain over temporary subcontracting necessitated by a strike, where the subcontracting does not transcend measures reasonably needed to maintain its operations in such circumstances. *Empire Terminal*, 151 NLRB 1359 (1965), *enfd. sub nom.*, *Dallas Gen'l Driver, Local 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966).

On review, as before the Board, the Union does not contest the lawfulness of temporarily subcontracting work during a strike. Instead, the Union's principal claim is a factual one that it bases on its preferred view of the record. The Union

argues (Br 8-18) that Finch made a decision during the strike to subcontract pulp operations permanently, and presented that decision to the Union as a *fait accompli*. In this regard, the Union draws on the distinction between temporary subcontracting, which is lawful because it enables an employer to continue operating in an emergency situation thrust upon it by a strike (*see* p. 44), and permanent subcontracting, which is impermissible if it exceeds an employer's need to keep its business going during a strike. *See Land Air Delivery v. NLRB*, 862 F.2d 354, 358-59 (D.C. Cir. 1988) (employer's unilateral decision permanently to subcontract bargaining unit work during economic strike held unlawful). The Union contends that Finch's subcontracting fell in the latter category and was therefore unlawful.

We show below, however, that the Board (A 3-4) reasonably found that Finch's spot purchases of pulp during the employees' economic strike constituted a lawful temporary measure to maintain its business operations, and therefore that Finch did not violate Section 8(a)(5) and (1) of the Act by failing to bargain with Local 18 over that action.

2. Substantial evidence supports the Board's finding that Finch made a lawful decision to purchase pulp temporarily during the strike, rather than a decision to permanently continue buying market pulp regardless of the strike's duration

The record in this case amply supports the Board's finding (A 1,3-4,19) that Finch's subcontracting during the economic strike was a temporary, and therefore

lawful, measure to maintain its operations during the strike. At the start of the strike, as part of its strike-contingency plan, Finch shut down its pulp mill because it knew--based on operational difficulties experienced during the 19-day strike in 1996--that supervisors and skilled replacement workers would not be available in sufficient numbers to operate the pulp mill and wood yard during the strike.⁹

Finch also knew that pulp was available on the market at historically low prices due to an industry-wide recession. As the Board reasonably found (A 3-4), to continue Finch's papermaking operations, it began making spot purchases of pulp on the open market, and tailored its purchases to the expected duration of the strike. Thus, as the Board emphasized (A 3-4), Finch placed spot orders for pulp with delivery dates only through December 2001, which matched its reasonable projection of the strike's duration based on the strikers' eligibility for 26 weeks of employment insurance.

As noted above p. 42, the Union's primary contention (Br 6, 9-10) is that in July-August 2001, Finch made a unilateral and *permanent* decision to buy pulp regardless of the strike's duration. The Board, however, carefully reviewed the record and found (A 3-5) no evidence that Finch made a fixed decision during the

⁹ The Union does not contend that Finch's contingency plan was unlawful. And it cannot, because "an employer is entitled to act on its judgment by preparing a contingency plan for the possibility that the Union's resistance would be strong and persistent enough to deadlock the negotiations and cause a strike." *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1444 (D.C. Cir. 1997).

strike to permanently continue subcontracting for pulp regardless of how long the strike lasted. As the Board noted, Finch only made spot purchases, and did not enter into a single or unitary subcontract for the purchase of hardwood pulp. (A 2,4,15;306,1391.) Nor did Finch enter into a long-term contract for pulp in the summer of 2001, even when the price reached an historic low. (A 1391.) Rather, as the Board pointed out (A 3), Finch continued to monitor the fluctuating market price of pulp, as well as the quality of its manufactured products, as it evaluated whether to make additional spot purchases based on its operational needs relative to the strike. (A 2&n.8,4,15,20;294,306,319,325-326,339.) The Board reasonably found (A 4) that these circumstances refuted the Union's claim that Finch made a decision during the strike to permanently subcontract for pulp without regard to the strike's duration.

Nonetheless, the Union cites (Br 10-11) to the testimony of Finch's president, Richard Carota that, during the strike, Finch made a decision "to operate with purchased pulp so long as it could continue to get low cost pulp on the market." (A 297.) The Board reasonably found (A 4), however, that Carota did not testify about any change in the original decision to temporarily subcontract because of the strike. Indeed, Carota testified that he did not recall making a "permanent subcontracting decision" during the strike. (A 281-282.) Therefore, the Board was well warranted in finding (JA) that, at most, Carota's testimony is

subject to the interpretation that an increase in the cost of pulp could have caused Finch to reconsider its original decision to subcontract because of the strike. But it does not follow that the price of pulp at the time of the original decision, or a lower price at a subsequent time during the strike, displaced the original reason for subcontracting, which was to cope with an economic strike. And, as the Board reasonably found (A 4), if cost had become the reason for subcontracting, Finch would have sought to “lock in” the lower cost for the future, which it never did.

There is no merit to the Union’s assertion (Br 9-10, 13) that Finch based its decision to keep purchasing pulp, not on the fact that employees were engaged in an economic strike, but on market considerations. In so contending, the Union forgets that it was the employees’ economic strike which forced Finch to find an alternate source of pulp for its paper mill. That Finch found it more cost-effective to purchase pulp, rather than hire replacement workers as it was entitled to do,¹⁰ hardly undermines the Board’s reasonable finding that Finch was simply attempting to cope with an economic strike by taking a series of temporary measures that consisted of making spot purchases on the open market.

The Union also misses the mark in asserting (Br 11-13) that the Board failed to weigh company statements set forth in certain “contemporaneous documents.” Contrary to the Union, those documents fail to establish that Finch’s decision to

¹⁰ See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (employer may hire replacement workers during an economic strike).

purchase pulp was a permanent rather than temporary measure not linked to the strike's expected duration. Two of the four documents cited by the Union merely apprise supervisors, workers, and stockholders of how Finch was doing during the strike; neither document shows that Finch had made a decision to close the pulp mill permanently.¹¹ The other two documents post-date the strike, and do not undermine the Board's finding that the subcontracting during the strike was a temporary measure that Finch took in response to its employees' economic action.¹²

Nor does the Union advance its case by repeatedly referring (Br 4, 6-8) to President Carota's use of the term "indefinitely" to describe Finch's decision during the strike to purchase pulp and keep the pulp mill closed. Although Carota answered suppliers' and employees' inquiries about restarting the pulp mill by stating that it was "indefinite," he did so because he did not know how long the market price of kraft pulp would remain low, or how long the strike would last. (A 281-282.)

¹¹ Thus, in the July 23, 2001 memorandum, Finch stated only that it did not plan to run the pulp mill "for several months"--a time frame well within the strike's expected duration. (A 1203.) In the September 14, 2001 letter, Finch simply remarked on the quality and cost of purchased pulp, and predicted (consistent with the strike's expected duration) that by the first quarter of 2002, pulp prices would be high enough to justify resuming pulp mill operations. (A 1152)

¹² Thus, consistent with the Board's findings, Finch's December 14, 2001 letter notes that the pulp mill was shut down "as a temporary measure," rather than permanently, and it was not dismantled. (A 1107.)

Interestingly, the Union's own evidence--which it fails to mention here--shows that it too understood that Carota used the term "indefinite" to mean that Finch would purchase pulp only until the strike ended. Thus, the Union's chief negotiator, LaBrum, testified that he read in various newspaper articles that Finch was purchasing pulp "indefinitely," but, that, he did not give much weight to the term indefinite because "it was [his] understanding that the pulp mill was shut down indefinitely, because the duration of the strike was indefinite." (A 104,106-107,132.) LaBrum conceded that because the Union did not know how long the strike would last, "indefinite, from [the Union's] standpoint, was the duration of the strike." (A 100,103-104,132.) Labrum clarified that he never asked Finch to explain what it meant by "indefinite" closure of the pulp mill because the Union knew Finch did not have the ability to make its own pulp without the striking employees, and therefore that Finch was buying pulp "indefinitely for the duration of the strike." (A 100,148-149,151-152.)

In sum, substantial evidence supports the Board's finding that Finch's unilateral subcontracting for pulp during the strike was, at all times, a lawful temporary measure undertaken to continue its business operations. Accordingly, Finch was not obligated to bargain over this decision, and the Board therefore dismissed the Section 8(a)(5) and (1) complaint allegation. Thus, as we show next, the Board properly found (A 4) that the economic strike never converted to an

unfair labor practice strike, and consequently, the strikers remained economic strikers whom Finch lawfully recalled in accordance with the parties' negotiated recall agreements.

C. Based on Its Finding that the Strike Remained Economic in Nature, the Board Reasonably Found that Finch Was Entitled To Recall Former Strikers in Accordance with the Parties' Negotiated Recall Agreements; the Board therefore Appropriately Dismissed the Complaint Allegation that Finch Violated Section 8(a)(3) and (1) of the Act by Not Immediately Reinstating Former Strikers

1. The Board reasonably found that Finch was not required to reinstate the former economic strikers immediately, but rather was entitled to recall them in accordance with the parties' negotiated recall agreements

Based on its erroneous premise that Finch's subcontracting during the strike was unlawful, the Union further contends (Br 18-21) that the subcontracting prolonged the strike and converted it into an unfair labor practice strike,¹³ and therefore that Finch violated Section 8(a)(3) and (1) of the Act by not immediately

¹³ A strike begun in support of economic objectives becomes an unfair labor practice strike only when the employer commits an intervening unfair labor practice that makes the strike last longer than it otherwise would have. *See Soule Glass Glazing Co. v. NLRB*, 652 F.2d 1055, 1079-80 (1st Cir. 1981). It must be found, not only that the employer committed an unfair labor practice after the commencement of the strike, but that as a result, the strike was "expanded to include a protest over [the] unfair labor practice," and that settlement of the strike was thereby delayed and the strike prolonged. *NLRB v. Top Mfg. Co.*, 594 F.2d 223, 225 (9th Cir. 1979).

recalling them when the strike ended.¹⁴ The Board, however, reasonably rejected (A 4) these contentions because, as shown above pp.45-50, Finch's subcontracting remained, at all times during the strike, a lawful temporary measure undertaken to continue its business operations. In these circumstances, the Board reasonably found (A 23) that the strikers remained economic strikers. Accordingly, the Board appropriately dismissed the complaint allegation that Finch violated Section 8(a)(3) and (1) of the Act by delaying the former economic strikers' reinstatement in accordance with the parties' recall agreement.¹⁵ (A 1,4,9&n.32,10&n.3,23.)

2. There is no merit to the Union's further contention that Locals 18 and 155 engaged in joint bargaining--a claim that, in any event, would have come into play only if the strike had converted to an unfair labor practice strike

As shown above pp. 45-50, Finch's spot purchases of hardwood pulp on the open market during the strike affected only the pulp mill employees, who were represented by Local 18, not Local 155. And Finch's subcontracting of pulp is the only action alleged in the complaint to constitute an unfair labor practice that prolonged the strike. Nevertheless, the Union--seeking to bestow unfair labor practice striker status and immediate recall rights on the striking paper mill

¹⁴ It is settled that unfair labor practice strikers are entitled to full and immediate reinstatement upon their unconditional offer to return to work--even if the employer has hired permanent replacement workers during the strike. *Mastro Plastics Corp v. NLRB*, 350 U.S. 270, 278 (1938).

¹⁵ Given this disposition, the Board did not need to pass on the judge's recommended finding (A 21) that the subcontracting did not, in any event, prolong the strike. *See* n.13 above (explaining strike conversion doctrine).

employees represented by Local 155, whom Finch had permanently replaced-- contends (Br 22) that Local 155 engaged in joint bargaining with Local 18. The Board, however, reasonably rejected this attempt at bootstrapping, for the reasons discussed below.

The Union asserts (Br 22) that “the Locals historically bargained jointly.” As the Board found (A 3&n.12,21), however, LaBrum, the chief spokesman for all seven unions at the bargaining table, admitted that he was unaware of any written document establishing joint bargaining, and that no such document was presented to Finch prior to the start of negotiations. (A 222,353,453-454.) As the Board also found (A 3&n.12,22), LaBrum acknowledged that he never informed the other five unions that Locals 18 and 155 would be bargaining jointly. (A 137-138.) Further, LaBrum admitted that, when negotiations started, Locals 18 and 155 submitted separate bargaining agendas to Finch and received separate copies of Finch’s last best contract offer, which they independently considered; and they later and executed separate collective-bargaining agreements. (A 136140,576,1342,1343.)

Local 18’s President, Michael Scarselletta, another member of the negotiating team, corroborated Labrum’s testimony that Locals 18 and 155 submitted separate proposals and agendas during negotiations, and that the Union never said it was engaged in joint bargaining. Further, Scarselletta admitted that he was unaware of any document establishing that Locals 18 and 155 would bargain

jointly. (A 351-355.) On this plethora of undisputed facts, the Board reasonably found (A 3&n.13,22) that the Union had failed to sustain its claim of joint bargaining.¹⁶ *See Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 116 (D.C. Cir. 2000) (parties must “clearly and unequivocally agree to joint bargaining”); *Don Lee Distributor, Inc. v. NLRB*, 145 F.3d 834, 841 (D.C. Cir. 1998) (“knowledge and consent” of other party required for joint bargaining).

3. The Board reasonably rejected, as exceeding the scope of the complaint, the Union’s theory that Finch separately violated the Act by misleading the Union about the status of replacement workers hired for the paper mill

In his complaint, the General Counsel did not allege that, even if the paper mill employees remained economic strikers, Finch separately violated Section 8(a)(3) and (1) of the Act by hiring workers to replace them permanently during the strike. (A 466.) Undaunted by this limitation, the Union (Br 24-31) nevertheless theorizes at length that even if the paper mill employees were economic strikers, Finch independently violated the Act by making a “misrepresentation” to the Union about the status of their replacements.

The Board (A 3&n.13,24), however, reasonably rejected this attempt by a charging party to expand the parameters of the complaint. *See Kimtruss Corp.*,

¹⁶ The Union does not advance its case by claiming (Br 22) that Finch’s knowledge of the Union’s “pool voting practice” establishes joint bargaining. Pool voting had nothing to do with joint bargaining. As Local 155 President Scarselletta explained, pool voting merely referred to the Union’s procedure for ratifying a strike vote. (A 438-439.)

305 NLRB 710, 711 (1991) (charging party may not enlarge upon or change the General Counsel's theory of the case). As the complaint establishes, the General Counsel was alleging only that Finch unlawfully refused to bargain with Local 18 over the subcontracting of pulp mill operations; that this alleged unfair labor practice prolonged the strike and converted it into an unfair practice strike; and that the paper mill employees represented by Local 155 also became unfair labor practice strikers because, allegedly, the two locals engaged in joint bargaining. (A 466.) Nowhere in the complaint did the General Counsel allege that even if the paper mill strikers remained economic, Finch violated the Act by permanently replacing them or misleading the Union about the status of their replacements.¹⁷

¹⁷ The Union does not help itself by asserting (Br 24-28) that it was merely attempting to introduce evidence to rebut Finch's defense that it hired permanent replacements for the striking paper mill employees. Regardless of whether the paper mill employees were economic or unfair labor practice strikers, the status of the workers hired to replace them is immaterial. As noted above n.10, if their strike was economic, the status of their replacements is beyond the scope of the complaint. And, if their strike had converted to an unfair labor practice strike, which it did not, it would have made no difference whether Finch replaced them temporarily or permanently; either way, unfair labor practice strikers are entitled to immediate reinstatement. *See* n.14 above.

D. The Board Reasonably Found that Because the Union Waived Its Right to Bargain, Finch Did Not Violate Section 8(a)(5) and (1) of the Act by Unilaterally Subcontracting Pulp Mill Work after the Strike Ended

The Board (A 4-5) reasonably found that, because the Union never demanded bargaining, Finch did not violate Section 8(a)(5) and (1) of the Act by failing to negotiate over the separate decision that it made after the strike ended to keep its pulp mill closed and purchase pulp for another 19 months--even though that decision concerned a mandatory subject of bargaining. In its brief, the Union fails to squarely confront the Board's waiver finding. Instead, the Union (Br 19)--again relying on its erroneous view of the record, according to which Finch made a decision during the strike to subcontract pulp operations permanently--claims that during the strike, Finch presented that supposed decision as a *fait accompli*. As shown, however, the record amply supports the Board's finding that during the strike, Finch did not make a decision to subcontract pulp operations permanently; rather, after the strike ended, Finch reassessed its situation and made a new decision not to reopen the pulp mill.

The Union does not even argue that it requested bargaining over that separate post-strike decision. Instead, the Union claims (Br 18)--for the first time in these proceedings--that an information request it made in January 2002 constituted a bargaining demand. Under Section 10(e) of the Act, however, the Court lacks

jurisdiction to consider the Union's defense, because the Union failed to present it to the Board in the first instance. *See* cases cited above pp. 35, 37.

Finch, of course, does not complain about the Board's dismissal of the complaint allegation that it violated the Act by failing to bargain over its post-strike subcontracting. Finch does, however, take issue with the Board's underlying rationale, arguing (Br 35-43) that the Board erred in categorizing the post-strike subcontracting as a mandatory subject of bargaining. We show below that Finch, as the prevailing party with respect to this complaint allegation, lacks standing to challenge the Board's underlying rationale. We also show that, in any event, the Board reasonably characterized the post-strike decision to subcontract as a mandatory subject of bargaining.

1. The Union waived its right to bargain over Finch's post-strike subcontracting

The Board and the courts have long held that when a union has notice of an employer's proposed change that affects a mandatory subject of bargaining, it must make a timely request to bargain in order to preserve its right to negotiate over the subject. *See, e.g., Citizen's National Bank of Wilmar*, 245 NLRB 398, 389-90 (1979), *enfd.*, 644 F.2d 40 (D.C. Cir. 1981). "Notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining." *ILGWU v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). "Formal notice is not necessary, as long as the union has actual notice." *W.*

W. Grainger, Inc. v. NLRB, 860 F.2d 244, 248 (7th Cir. 1988). Upon receipt of clear and unequivocal notice of a proposed change, a “union must act with due diligence in requesting bargaining to preserve its right.” *YHA, Inc. v. NLRB*, 2 F.3d 168, 173 (6th Cir. 1993). A union’s failure to assert its bargaining rights will result in a waiver of those rights. *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 51 (2d Cir. 1983).

The record shows that as early as November 13 and 14, 2001, the Union received formal notice that Finch intended to keep the pulp mill closed for the foreseeable future and to continue subcontracting for pulp. (A 2,5,16;129,879,1515.) Over the course of the next week, the parties were still engaged in wrapping up their negotiations for successor collective-bargaining agreements and recall agreements, before the strike ended on November 21, 2001. Finch did not make a post-strike pulp purchase until December 18. Yet, neither during that time, nor at any time thereafter, did the Union request that Finch bargain over its decision to continue purchasing pulp and to keep the pulp mill idle. In these circumstances, the Board was well warranted in finding that the Union waived its bargaining rights. *AT Systems West, Inc., f/k/a Armored Transport, Inc. v. NLRB*, 294 F.2d 136, 140 (D.C. Cir. 2002) (“a refusal-to-bargain charge cannot be sustained unless there is ‘some indicia of a demand’” by the union) (quoting *Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001)).

The Union defends its failure to request bargaining by claiming (Br 15) that “Finch failed to tell [it] about the indefinite nature of the subcontract and ultimately presented it as a *fait accompli*.” This argument, however, cannot be reconciled with the evidence related to the post-strike subcontracting. Thus, the Board reasonably rejected (Br 5-6) the Union’s *fait accompli* claim, finding instead that at all times there was a meaningful opportunity to bargain, which the Union simply did not take. The Board found (A 6) that after the strike ended, Finch did not enter into new contracts until December 18, a full month after its November 13 and 14 notices to the Union of its intention to keep the pulp mill closed for the foreseeable future because of available cheap market pulp. Moreover, as the Board also found (A 6), at no time in the post-strike subcontracting phase did Finch enter into any long-term contracts; instead, it continued to purchase pulp through individual spot orders. Thus, Finch’s incremental approach to purchasing pulp, coupled with the fact that it maintained the pulp mill in a condition ready for reactivation, afforded the Union ample opportunity to request bargaining at any time over future purchases.

While “[a] union is not ‘required to go through the motions of requesting bargaining . . . if it is clear that an employer has made its decision and will not negotiate,’” the Union here failed to establish that Finch’s post-strike subcontracting decision was of such an irrevocable nature that requesting

bargaining would have been “a futile gesture.” *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003) (internal quotations omitted). *See also Shell Oil Co.*, 149 NLRB 303, 308 (1965) (after employer notified union of decision to implement change, parties continued to meet and discuss economic reasons for proposed change; but union simply voiced objection to employer’s decision, and did not show that it was “of an irrevocable nature;” accordingly, union’s failure to request bargaining constituted waiver).

Having failed to overcome the evidence supporting the Board’s waiver finding, the Union now argues (Br 18) that its January 2002 information request for pulp contracts constituted a bargaining demand. Because the Union never raised that argument before the Board, however, it is barred from doing so here by Section 10(e) of the Act. *See* cases cited above (pp. 35, 37) and *Brockton Hosp. v. NLRB*, 294 F.3d 100, 105-06 (D.C. Cir. 2002); *Seattle Opera v. NLRB*, 292 F.3d 757, 764 n.7 (D.C. Cir. 2002). In sum, the Court lacks jurisdiction to consider this argument because the Union failed to present it to the Board in the first instance.

Further, after the Board found waiver, the Union did not file with the Board a motion for reconsideration, as it was permitted to do under Section 102.48(d)(1) of the Board’s Rules and Regulations (29 CFR § 102.48(d)(1)). Such a motion would have given the Board notice of the Union’s objection, and an opportunity to fix its alleged mistake. *See Elastic Stop Nut. Div. of Harvard v. NLRB*, 921 F.2d 1275,

1284 (D.C. Cir. 1990). *Accord United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.”). In sum, having failed to file a motion for reconsideration, the Union is barred from challenging the Board's waiver finding before the Court. *See* cases cited above pp. 35, 37 and *Commercial Workers Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007).

2. Finch lacks standing to challenge the Board’s reasonable finding that the post-strike decision to subcontract its pulp mill operations was a mandatory subject of bargaining

Although it prevailed before the Board with respect to the complaint allegation that it violated Section 8(a)(5) and (1) of the Act by failing to bargain over its post-strike decision to subcontract for pulp and keep its pulp mill closed, Finch now challenges (Br 35-43) the Board’s underlying finding that the decision concerned a mandatory subject of bargaining. However, Finch’s argument is not properly before the Court. Under Section 10(f) of the Act, only a “person aggrieved” by a final order of the Board may obtain appellate review. Because Finch, as the charged party, “has been afforded the *relief* it had sought respecting the controlling issue,” it “is not . . . such a person aggrieved as to be entitled to seek review” of that portion of the complaint on which it prevailed. *Insurance*

Workers v. NLRB, 360 F.2d 823, 827 (D.C. Cir.1966) (emphasis in original).

Indeed, when the Board dismisses certain portions of the complaint and issues an order on others, the charged party is aggrieved only “[a]s to that portion which results in a remedial order against him.” *UAW v. Scofield et. al*, 382 U.S. 205, 210 (1965). Here, the Board gave Finch “all the relief requested,” by dismissing the relevant complaint allegation; thus, as the prevailing party on that allegation, Finch “lack[s] standing to appeal.” See *Sea-Land Service, Inc. v. Dep’t of Transp.*, 137 F.3d 640, 647 (D.C. Cir. 1998). Accord *Workers Int’l Union, Kansas City Local 5-114 v. NLRB*, 694 F.2d 1290, 1294 (D.C. Cir. 1982). Therefore, the Court need not concern itself with a challenge to a prevailing party’s complaint about an underlying rationale.

In any event, the Board (A 4-5) reasonably rejected Finch’s claim, which it repeats here (Br 36-38, 41-43), that its decision to continue purchasing pulp instead of producing it was a management decision entirely exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). As the Board found (A 4-5), Finch’s decision more closely resembled the type of subcontracting found to be a mandatory subject of bargaining in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1969). Because, as we now show, the Board based its finding on a permissible interpretation of the Act in light of Supreme Court precedent, it is entitled to deference. Accord *Rock-Tenn Co. v. NLRB*, 101 F.3d

1441, 1446 (D.C. Cir. 1996).

In *First National Maintenance*, the Court held that an employer, which provided cleaning and maintenance services to commercial establishments, was not required to bargain with a union over its decision to discontinue operations at a nursing home and discharge its employees working there, after it was unable to secure an increase in its management fee. The Court reasoned that the employer's decision to shut down part of its business constituted a significant "change in the scope and direction of the enterprise [which] is akin to the decision whether to be in business at all," and that bargaining over such management decisions, which directly impact employment but have as their focus economic profitability, should be required "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 677-79. Based on its finding that the benefit of bargaining did not outweigh the burden placed on the employer's right to terminate part of its business for non-labor cost reasons, the Court held that the employer did not have a duty to bargain over the decision. *Id.* at 686.

By contrast, in *Fibreboard*, 379 U.S. at 215, the Court held that an employer was required to bargain over its decision to subcontract bargaining unit work when it involved the mere replacement of bargaining unit employees with those of an independent contractor to do the same work under similar conditions of

employment. The *Fibreboard* Court underscored that a key consideration is whether the employer's conduct "is suitable for resolution within the collective bargaining framework [.]” *Id.* at 214. Where, as here, labor costs underlie the employer's subcontracting decision, it is particularly amenable to the collective-bargaining process. *See, e.g., Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 311 (D.C. Cir. 2003); *Geiger-Ready-Mix Co. of Kansas City v. NLRB*, 87 F.3d 1363, 1368-69 (D.C. Cir. 1996).

The Board reasonably found (A 4-5) that Finch's decision to subcontract for pulp rather than to produce it using bargaining unit employees "was more like the subcontracting at issue in *Fibreboard* than the partial closing at issue in *First National Maintenance*." As the Board emphasized, at bottom, Finch replaced the unit employees assigned to the pulp mill with those of the contractors that Finch engaged to provide the pulp. And, labor costs were an important factor in the decision, contrary to Finch's assertion (Br 41-42). (A 287-289,309,361-362,1107-1125,1152,1179,1188-1203,1238-1265.) Thus, as the Board emphasized, during negotiations, Finch repeatedly emphasized its need for significant labor cost concessions, and it specifically identified labor costs as an important factor in the competitiveness of its pulp mill operation versus those of its subcontractors. (A 1238.) In these circumstances, the Board reasonably concluded that Finch's decision "was of the type that 'is suitable for resolution within the collective

bargaining framework [.]’” JA 5, quoting *Fibreboard*, 379 U.S. 214. *Accord Rock-Tenn Co. v. NLRB*, 101 F.3d at 1446 (Board permissibly analyzed subcontracting to third party under *Fibreboard* paradigm, where the decision was based on large cost savings, including labor costs).

Further, in aligning this case with *Fibreboard* rather than *First National Maintenance*, the Board also reasonably relied on evidence that Finch did not, as it claims (Br 39), terminate part of its business or effect a significant change in the direction of its enterprise. Rather, Finch at all times maintained its pulp mill in a state ready for activation. Further, even while subcontracting for pulp, Finch continued to produce essentially the same paper products using its same papermaking machines. (A 290,329-333,338,1203.) And, of course, as soon as the market price of pulp rose to the point where it would have been more expensive for Finch to continue buying pulp than to pay its own workforce to produce it, Finch reopened the pulp mill and recalled employees to resume making the same products that they were making before the strike. (JA 73-74, 245.) In these circumstances, the Board reasonably concluded (A 4-5) that Finch’s subcontracting for pulp was hardly a change akin to “opening a new line of business or going out of business entirely.” *First National Maintenance*, 452 U.S. at 688. The Board therefore appropriately found that Finch’s decision to continue subcontracting for pulp after the strike was not exempt from bargaining under that case. Accordingly,

and contrary to Finch's further claim (Br 35), the Board did not need to undertake the sort of balancing analysis that comes into play when an employer has changed "the scope and direction of the enterprise."¹⁸ *Id.* at 678-79.

Finch appears to contend (Br 41) that even if, during the strike, its decision to purchase pulp rather than hire replacement workers had turned on labor costs, its post-strike decision not to reopen the pulp mill turned on other factors. But, Finch fails to identify the other factors--aside from the cost of reactivating the mill, which was hardly its primary consideration, since it did eventually reactivate--that allegedly supplanted its admitted desire to save on labor costs that Finch itself (Br 42) estimates at \$15 million annually. Accordingly, on this record, the Board reasonably found that the relative cost of purchasing pulp versus rehiring the former strikers--and the savings that Finch realized by subcontracting for pulp rather than incurring substantial labor costs--played a significant role in Finch's unilateral decision not to reopen the pulp mill after the strike.¹⁹

¹⁸ Further, Finch errs in relying (Br 38-41) on *Arrow Automotive Ind., Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988). That case, unlike the instant one, involved an employer's decision to close its plant entirely and to reallocate large amounts of capital--an entrepreneurial decision of such magnitude that it fell under the *First National Maintenance* paradigm. *Id.* at 231.

¹⁹ Finch errs in relying (Br 41) on a factually distinguishable case, *Louisiana-Pacific Corp.*, 312 NLRB 165, 167 (1993). There, unlike the instant case, the employer simply arranged for a contractor to fill an order, and then recalled its own employees to fill a different order for the contractor. As the Board found, the employer did not violate the Act by making the swap unilaterally because it did not cause employees to suffer a significant detriment. *Id.*

Finally, the Court should reject Finch's supposition (Br 42-43) that bargaining could not have resulted in union concessions that would have caused Finch to change its mind about subcontracting. As the Board noted, even if the Union ultimately would have been unable to satisfactorily address Finch's labor cost concerns, "national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation." JA 5 n.16 quoting *Fibreboard*, 379 U.S. at 214. *Accord Rock-Tenn Co. v. NLRB*, 101 F.3d at 1446 (Board need not consider employer's argument that bargaining over subcontracting would have been futile).

In sum, although the Board reasonably found that Finch's decision to replace unit employees by subcontracting their work involved a mandatory subject of bargaining, Finch lacks standing to challenge that finding. As shown above pp. 55-61, because the Union waived its right to bargain over the decision by failing to demand bargaining, the Board ultimately ruled in Finch's favor--it dismissed the complaint allegation that Finch violated the Act by refusing to bargain over the post-strike subcontracting. Accordingly, as Finch itself recognizes (Br 43), the question whether the Board appropriately characterized the post-strike subcontracting as one involving a mandatory bargaining subject is one that the Court should not reach.

CONCLUSION

For the foregoing reasons, the Board respectfully asks that the Court enter judgment denying the petitions for review and enforcing the Board's order in full.

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[H:FinchPruyn final brief-#jbjh]

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Dated in Washington, D.C.
this 13th day of May, 2008

ADDENDUM**Relevant provisions of the National Labor Relations Act
29 USC §§ 151-69:**

Section 7. (29 USC § 157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8. (29 USC § 158)

Section 8(a) [Unfair labor practice by employer]: It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title];

Section 10. (29 U.S.C. § 160)

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce

(e) The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside

National Labor Relations Board Rules and Regulations
29 C.F.R. §§ 101–103:

Section 102.48(d)(1)

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration . . . of the record after the Board's decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FINCH, PRUYN & COMPANY, INCORPORATED)	
Petitioner/Cross-Respondent)	
v.)	Nos. 07-1036,
NATIONAL LABOR RELATIONS BOARD)	07-1080
Respondent/Cross-Petitioner)	
and)	
UNITED STEEL, PAPER and FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and)	
SERVICE WORKERS INTERNATIONAL UNION)	
Intervenor)	
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UNITED STEEL, PAPER and FORESTRY, RUBBER,)	
MANUFACTURING ENERGY ALLIED INDUSTRIAL and)	
SERVICE WORKERS INTERNATIONAL UNION)	
Petitioner)	
v.)	No. 07-1085
NATIONAL LABOR RELATIONS BOARD)	
Respondent)	
and)	
FINCH, PRUYN AND COMPANY, INCORPORATED)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief in the above-captioned case contains 15,923 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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this 13th day of May, 2008

